IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. 1525

AMERICAN SMELTING & REFINING COMPANY, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, AND UNION PACIFIC RAILROAD COMPANY, PLAINTIFFS,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Civil No. 1524

UNITED STATES SMELTING REFINING AND MINING COMPANY, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, AND UNION PACIFIC RAILROAD COMPANY, PLAINTIFFS,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

CONSOLIDATED CAUSES

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, defendants-appellants, United States and Interstate Com-

merce Commission, submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final decree of the district court entered in these causes, dated January, 7, 1949, and filed January 10, 1949. A petition for appeal was filed on March 7, 1949, and is presented to the district court herewith.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the final decree of the district court in these causes is conferred by the Judicial Code, as revised by the act approved June 25, 1948, effective September 1, 1948, Title 28, U. S. Code, Sections 1253 and 2101(b), consolidating and continuing the substance of prior provisions of law relating to direct appeals from decisions of three-judge courts in suits to set aside orders of the Interstate Commerce Commission. The following decisions, appeals in which were taken pursuant to such prior provisions thus codified, sustain the jurisdiction of the Supreme Court to review the judgment of the specially constituted district court on direct appeal in these cases. *United States* v. *American Sheet & Tin Plate Company*, 301 U.S. 402; *United States* v. *Wabash R.R. Co.*, 321 U.S. 403; *United States* v. *Capital Transit Company*, 325 U.S. 357; *United States* v. *Pennsylvania Railroad Co.*, 326 U.S. 612; *Corn Products Refining Company* v. *United States*, 331 U.S. 790.

STATUTES INVOLVED

Section 6(7) of the Interstate Commerce Act (49 U.S.C. 6(7)), provides as follows:

> No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; *nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified,* nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs. (Italics supplied.)

THE ISSUES AND THE RULINGS BELOW

A statutory three judge district court for the District of Utah, by its final decree dated January 7, 1949, and filed January 10, 1949, set aside orders of the Interstate Commerce Commission, dated May 14, 1948,[1] requiring the railroads serving cer-

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[1] The order assailed in No. 1525 was made in proceedings entitled *American Smelting & Refining Company, Ex Parte No. 104 (75th Supplemental Report)*, 270 I.C.C. 359, and related to plants of that company at Garfield and Murray, Utah, and Leadville, Colorado. The order assailed in No. 1524 was made in *United States Smelting, Refining & Mining Company, Ex Parte No. 104 (76th Supplemental Report)*, 270 I.C.C. 385, and related to the plant of that company at Midvale, Utah. Both proceedings constituted a continuation of a proceeding known as *Ex Parte No. 104, Practices of*

tain industrial plants of plaintiff smelting companies to cease and desist from furnishing, without appropriate charges therefor in addition to the rates for line-haul transportation, certain switching and car-spotting service within said plants in excess of the carriers' line-haul transportation obligation as determined by the Commission. The Commission found that the furnishing of such service by the carriers was a violation of Section 6(7) of the Interstate Commerce Act and ordered the carriers to cease and desist therefrom.

The district court held that the evidence did not support the determination made by the Commission with respect to the points where industrial interruption or interference was experienced and the line-haul transportation ended. The district court held that the interchange tracks at each plant, which the Commission found to be the respective points where line-haul transportation ended, and intra-plant service began, were in fact used by the

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Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, in which a report, dated May 14, 1935, 209 I.C.C. 11, set forth certain standards for determining the amount of terminal switching service which may properly be performed by carriers under their line-haul rates. In numerous supplementary reports the general principles there laid down have been applied to the fact situations and operating conditions found to exist at various industrial plants.

The orders of May 18, 1948, are substantially identical with prior orders of October 14, 1946, which were assailed in prior suits (Civil Nos. 1324 and 1325), wherein the court in a decision rendered November 14, 1947, temporarily enjoined the orders of October 14, 1946, and remanded the cases to the Commission for further proceedings "upon a new theory" (in accordance with *Securities & Exchange Commission* v. *Chenery Corporation*, 332 U. S. 194, 196) and "for such action as it may find justifiable in the premises." The Commission on December 5, 1947, reopened the proceedings for reconsideration on the existing record. Pursuant to such reconsideration it rendered its reports of May 18, 1948, upon which the new orders of that date were based.

carriers as part of their railroad yard facilities, utilized for the performance of carrier functions, and that the shippers were entitled to an additional placement of cars beyond such points. In so holding the district court substituted for the Commission's determination of an administrative question the court's own appraisal of the same facts.

The principal question decided by the district court, however, was whether as a matter of law the Commission's findings supported its order to cease and desist from violation of Section 6(7) of the Act.[2] The district court held that they did not; that it was not enough for the Commission to determine the points at each plant where line-haul transportation begins and ends, in order to forbid as a violation of Section 6(7) the rendition of service beyond such points without compensation in addition to the rate for line-haul transportation; but that it is also necessary for the Commission to make a finding that the level of the line-haul rate was not sufficiently high to include compensation for the additional service rendered in excess of line-haul transportation. In so deciding, the district court held that the Commission was required to make a finding upon a subject with respect to which the Commission was not required to admit evidence.[3]

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[2] In the conclusions of law prepared by plaintiffs and adopted by the district court, it is also held that the Commission's orders violate Sections 1(5)(a) and 3(1) of the Act, and that findings under Section 6(1) are necessary in order to require carriers to state line-haul and terminal switching charges separately. Appellants regard reference to these sections as extraneous to the issues involved in the case at bar, although the making of these conclusions of law constitutes error and is assigned as such.

[3] The Commission's ruling that evidence on that subject should be excluded as irrelevant was judicially sustained in

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The district court's decision is not only clearly erroneous, but would be productive of injurious consequences to the public. That decision would necessitate turning every *Ex Parte No. 104* case into a rate case. This would add further and tremendously burdensome obstacles to those already encountered by the Commission [4] in the performance of its duty "to proceed as rapidly as may be to suppress violations of § 6(7) in the performance of switching services." *United States* v. *Wabash Railroad Co.*, 321 U.S. 403, 413. The district court's decision would not only transform every terminal service case into a rate case, but into a rate case depending upon obscure and subjective criteria, involving the psychological processes and undisclosed intent of railroad traffic officials. The Commission and the courts have always hitherto held that the determination of where a carrier's line-haul transportation ends at a particular industrial plant is a question to be determined by scrutiny of the physical facts and operating conditions at the plant, without the intrusion of competitive and bargaining considerations which might influence the judgment of a traffic official with respect to the level of rates deemed desirable or obtainable.[5] The task which

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Corn Products Refining Co. v. *United States*, 331 U. S. 790, the latest Supreme Court decision dealing with an order of the type involved in the case at bar.

[4] The Commission has often commented on the lack of cooperation by carriers and industries in establishing uniform practice and equality of treatment for all shippers with respect to terminal switching service. See 57th Annual Report of the Interstate Commerce Commission, pp. 58-59.

[5] As the Commission stated in its basic report of May 14, 1935 "what constitutes a carrier's duty . . . can readily be

the Commission ordinarily performs in a terminal service case is precisely that of correcting conditions which have arisen as a result of the natural pressure upon carriers' traffic officials to grant concessions to favored shippers controlling a large volume of business.

Performance by carriers for favored shippers of service in excess of that accorded to the public generally has long been recognized as an evil requiring the attention of regulatory and legislative authorities.[6] The adverse effect of such concessions in dissipating the carriers' revenues through the performance of services in excess of the carriers' legal transportation obligation seemed so widespread during the depression that the Commission of its own motion on July 6, 1931, instituted a proceeding known as *Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services*, wherein it made a basic report on May 14, 1935, 209 I.C.C. 11. The Commission made no order on the basis of that report, but set forth therein certain standards for determining the amount of switching service which may properly be performed by carriers as part of their line-haul transportation obligation under their line-haul rates. In supplementary proceedings the general principles laid down in that basic report have been applied to

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ascertained at any individual industry by experienced railroad operating men or committees if honestly performed without consideration of traffic reasons," 209 I.C.C. 11, at 38.

[6] The late Mr. Justice Brandeis, when counsel for the Interstate Commerce Commission in 1913-14, argued that a rate increase which the carriers were then seeking would be unnecessary if such preferential services accorded to certain favored shippers controlling a large volume of traffic were eliminated. Mason, *Brandeis: A Free Man's Life*, (1946) 341-342.

the physical facts and operating conditions found to exist at numerous industrial plants.[7]

The standards set forth in the Commission's basic report of May 14, 1935, in Ex Parte No. 104, 209 I.C.C. 11, were sustained in *United States* v. *American Sheet & Tin Plate Company*, 301 U.S. 42, decided in 1937. Since that time, in a long and unbroken line of judicial decisions following that case, the Commission's application of those standards to particular industrial plants has been uniformly upheld by the courts.[8]

As the result of these decisions, the general principle adhered to by the Commission and the courts is that line-haul transportation may or may not include car-spotting and switching service within an industrial plant to the point of loading and unloading cars; it includes such service if, and only if, the service can be performed at the carrier's ordinary operating convenience in a single uninterrupted movement. Where these conditions are not met, the carrier's transportation obligation under line-haul rates ends at the point where industrial interruption or interference due to plant operations is experienced. The precise determination of the point in time and space where line-haul transportation begins and ends is a function entrusted by law to the Commission.[9]

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[7] The orders involved in the case at bar were based upon the 75th and 76th of such Supplemental Reports.

[8] The most recent decisions sustaining the Commission's determinations with respect to the point where line-haul transportation begins and ends at particular industrial plants are *United States* v. *Wabash Railroad Company*, 321 U. S. 403; *Corn Products Refining Company* v. *United States*, 331 U. S. 790, and *Anaconda Copper Company* v. *United States*, 77 F. Supp. 611 (D. Mont., 1947).

[9] A clear statement of the applicable law is given by the late Mr. Chief Justice Stone in *United States* v. *Wabash Railroad Co.*, 321 U. S. 403, 407-412.

With respect to each of appellee's smelting plants involved in the instant proceedings, the Commission has made such a determination of the respective points within each plant where line-haul transportation begins and ends.[10] Consequently the performance by the carriers serving such plants of service in excess of the line-haul transportation obligation as so determined by the Commission constitutes the performance of industrial or intraplant service, not a part of the line-haul transportation covered by the line-haul rate. Accordingly the performance of such excess service, in the absence of an appropriate charge therefor in addition to the rate for line-haul transportation, is *ipso facto* an unlawful rebate and constitutes a violation of Section 6(7) of the Interstate Commerce Act. Therefore, the Commission has power to order the discontinuance of such service, and its cease and desist orders in the case at bar are valid and should be upheld on judicial review.

Appellees in their attack on the Commission's orders with respect to their plants originally advanced only two grounds of distinction upon which they relied to escape the effect of the line of authorities uniformly sustaining the Commission's determinations made in terminal service cases. These points were (1) that here the tariffs themselves recite that the rate shall cover the service furnished, and (2) that here the rates vary in accordance with the value of the commodity transported, which can be determined only after sampling, and that therefore such switching in excess

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[10] Appellants submit that such determinations are abundantly supported by substantial evidence of record, and that the district court erred in holding to the contrary.

of line-haul transportation as is furnished before completion of the sampling process is necessary in order to enable the carriers to compute the transportation charges. Both these circumstances were present in a companion case, *Anaconda Copper Company* v. *United States*, 77 F. Supp. 611 (D. Mont., 1947), which was decided in favor of the Commission by another three-judge court during the pendency of the instant litigation.[11] With respect to the second of the above points, it should be noted that in both the *Anaconda* case and the case at bar the tariffs provide that it is the duty of the shipper to certify the value of the ore after sampling, and that the carriers shall accept the value so certified. Obviously, therefore, the carriers are under no legal obligation to furnish without additional charge the excess transportation here condemned by the Commission.

Furthermore, with respect to the first alleged ground of distinction, the fact is that in the *Tin Plate* case in 1937 the same argument was advanced which appellees here rely upon. The allowances made to the shippers in that case were published in tariff form. The mere publication in tariff form does not excuse disregard of the Commission's determination with respect to the permissible amount of switching service which may be performed as a part of line-haul transportation. A violation of law by a carrier furnishing to favored shippers switching service in excess of its legal obligation is not cured or legalized by the fact that the carrier makes a public announcement plainly stating its intention to commit such a violation of law. Publication in tariff form of the

[11] No appeal was taken by the industry from the decision upholding the Commission's order.

carrier's purpose to accord such favored treatment cannot clothe the unlawful practice with immunity. *Merchants Warehouse Company* v. *United States*, 283 U. S. 501, 511; *B. & O. Railroad Co.* v. *United States*, 305 U. S. 507, 525-26.

If the appellee smelting companies were to be permitted to enjoy the preferential position with respect to the public generally which is accorded them under the district court's decision, great injustice and unfairness would result to other shippers, and especially to the unsuccessful litigants in all previous cases involving *Ex Parte No. 104* orders. This would be particularly true with respect to the *Anaconda Copper* case above referred to, which involved an industry competitive with the appellees here. Moreover, the same questions were presented as are presented here, except that the Anaconda Company had a stronger case on the facts with regard to its plant than the smelting companies do here. The *Anaconda* case thus applies *a fortiori* in every respect to the case at bar.

After the Commission's orders on reconsideration were issued in the instant proceedings, in which the Commission clarified its prior reports by making clear that it based its decision upon *Ex Parte No. 104* principles and not upon a determination with respect to the level of the line-haul rates, appellees argued that the absence of a finding as to the rate level was a fatal defect, and sought to distinguish the case at bar from prior terminal service cases upon that ground. But the fact is that in the *Corn Products* case [12] there was no finding with respect to the rate level, and indeed the Commission was sustained in ruling that evidence with respect to the question whether or not

[12] 331 U. S. 790.

the level of the line-haul rate had been made sufficiently high to include compensation for terminal service in the Chicago Switching District should be excluded as irrelevant. The appellant in that case raised, to no avail, every argument upon which appellees here rely.

It is thus evident that important issues, involving the administration of the Interstate Commerce Act so as to provide uniform practice with respect to switching service and equality of treatment for all shippers, have been erroneously decided by the district court and are raised on this appeal. It is accordingly submitted that substantial questions are involved which call for the appropriate exercise of appellate jurisdiction.

Dated March 3, 1949.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General,

HERBERT A. BERGSON,
Assistant Attorney General;

EDWARD DUMBAULD,
Special Assistant to the Attorney General,

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ALLEN CRENSHAW,
Attorney,
Interstate Commerce Commission.

FILED: U. S. District Court.
March 7, 1949.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

No. 1524 Civil

D. & R. G. W. R. R. ET AL., PLAINTIFFS,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

No. 1525 Civil

BINGHAM & GARFIELD RAILWAY, PLAINTIFF,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Before Judges Phillips, Kennedy and Johnson.

At Federal Building, Salt Lake City, Utah, Monday, October 18, 1948.

Opinion of the Court, stated by Judge PHILLIPS:

THE COURT: The Court reaffirms and remakes the findings of fact numbered 1, 2, 3, 4 and 5 in its order in the other cases; that is, its order in 1324 and 1325, civil.

The Court further finds that upon this record it must find and presume that the charges in the tariffs cover the services rendered beyond the points designated by the Commission as the end of the line haul in the three yards. Those points are designated in the order of the Commission as the "plant yard" at Garfield, the "hold tracks" at Murray, and the "flat yard" at Leadville.

The Court further finds, that there is no basis in the record for a finding by the Commission that the furnishing of the services referred to beyond the points above designated constitute either free services or constitute a rebate or violation of Section 6, Paragraph 7.

The Court further finds, that the plant yard at Garfield, the hold tracks at Murray, and the flat yards at Leadville are used by the railroads as terminal facilities; that is to say, are used as any terminal is used by a railroad where it brings the cars into the terminal for the purpose of further disposition to the consignee and that the evidence does not support the finding of the Commission that the line haul terminates at the plant yards, the hold tracks and the flat yards, for the reason that the shipper is entitled to an uninterrupted service beyond that point to a convenient point of delivery.

The Court desires to assert that it was argued when the case was here before that the effect of the order was to require the railroad merely to segregate their tariff charges and make a specific tariff charge for the haul to the end of the line haul, and a separate specific charge for switching services beyond the end of the line haul, and that the court, by remanding the case, gave the Commission the opportunity to make such an order under Section 6-1, which the Commission for reasons best known to itself thought not advisable to do.

We conclude, as a matter of law, that the evidence in this case does not support a finding of a violation of Sec. 6, Paragraph 7, of the Act, or a basis for an order to cease and desist from a violation of the provisions of that section.

I don't know whether the case is ripe for a permanent injunction, Gentlemen.

Mr. FINERTY: May I say a word on that?

THE COURT: I will hear from both of you.

Mr. FINERTY: I filed a motion when the court entered a temporary injunction in the old case, pointing out that under Section 47, Title 28, the court could only enter a temporary injunction pending determination of the issues before the court, and that after those issues had been determined a final injunction might be issued; though there might be a remand under the former injunction.

THE COURT: I assume there is no objection to a permanent injunction, because the whole case is before the court, isn't it?

Mr. CRENSHAW: I couldn't bind the Commission without reporting and a recommend to the Commission with reference to an appeal, and have the Commission decide what it wants to do.

THE COURT: It occurs to me, Gentlemen, that the case is fully submitted. All of the facts are clear.

Mr. FINERTY: That is my opinion.

THE COURT: All of the legal arguments have been made that could be made on a final hearing, and I see no reason why we shouldn't grant a permanent injunction against the enforcement of the order. Perhaps my associates will want to suggest some additional findings.

JUDGE JOHNSON: Couldn't the gentlemen here stipulate that it is on the merits.

THE COURT: Will you stipulate that this hearing is on the merits?

Mr. FINERTY: I think actually, Judge Johnson, that was the intention at the start.

THE COURT: The record may show that both sides agree that the case may be disposed of as upon final hearing.

Mr. CRENSHAW: May I suggest that a permanent injunction would leave it open to the Commission to reopen in any case if they wanted to reconsider, if they thought they could conform to the court's requirements.

THE COURT: You mean a temporary injunction?

Mr. CRENSHAW: No; this one.

THE COURT: All right,—the court will grant a permanent injunction.

Mr. CRENSHAW: We tried to do what we understood the court wanted us to do as a commission.

THE COURT: We are not criticising you.

Mr. CRENSHAW: Mr. Finerty is correct, I suppose in saying we are just stupid.

THE COURT: You had your own good reason for taking this course, and we have no criticism.

Mr. DUMBAULD: It occurs to me that the Commission might wish to make findings under 6-1, if that would be of benefit, and I wondered whether your injunction would permit that?

THE COURT: They can still do that.

Mr. CANNON: In referring to the various yards I believe you omitted the "assembly yard."

THE COURT: What we have said in this case applies equally to your case, except that the yard in question, designated by the Commission as the end of the line haul is called the "assembly yard," and the same findings will be made in both cases, with that differentiation.

Now you gentlemen can prepare a permanent injunctive order.

Mr. DUMBAULD: Will that include findings, conclusions and decree and everything, in a formal way?

THE COURT: I think we have indicated what they ought to be, and you can prepare them in both cases.

Mr. CRENSHAW: I suggest that they be submitted in chambers.

JUDGE KENNEDY: You gentlemen will stipulate that we may sign these findings, conclusions and order at our respective places?

Mr. CRENSHAW: Yes.

Mr. FINERTY: If we could get about ten days——

Mr. CANNON: The order will be a consolidated order, as it was last time?

THE COURT: Yes. You will have to differentiate between those assembly yards and those places.

Mr. CANNON: Yes.

THE COURT: Court is in recess.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH CENTRAL DIVISION

Civil No. 1525

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, and AMERICAN SMELTING & REFINING COMPANY, PLAINTIFFS,

vs.

THE UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Civil No. 1524

UNITED STATES SMELTING REFINING AND MINING COMPANY, a corporation, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, and UNION PACIFIC RAILROAD COMPANY, a corporation, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled causes, on stipulation of the parties, came on for final hearing on October 18, 1948, before a duly-convened statutory three-judge Court upon the application of the plaintiffs for orders to restrain and enjoin the carrying into effect of the respective orders of the Interstate Commerce Commission dated May 18, 1948, with respect to charges for terminal switching services involved in the transportation of carload freight to and from the smelters of the American Smelting & Refining Company and of the United States Smelting Refining and Mining Company, and all of the parties being represented by counsel and evidence having been introduced, briefs received, and

arguments made, and the Court being fully advised in the premises, makes the following findings of fact and conclusions of law:

Findings of Fact

(1) On November 14, 1947, a prior statutory court duly convened in this District and consisting of the same judges constituting the present statutory court, issued in certain proceedings before it, designated as Civil Actions Nos. 1324 and 1325, a single consolidated order, temporarily enjoining certain respective orders of the Interstate Commerce Commission of October 14, 1946, made in the same proceedings before the Commission, in which were entered its respective orders of May 18, 1948, here sought to be enjoined. Such proceedings before the Commission were supplemental proceedings, respectively designated as "American Smelting & Refining Company" and as "United States Smelting Refining and Mining Company", under a general proceeding before the Commission entitled "Ex Parte 104, Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services". In such general proceedings the Commission had previously issued a report, known herein as its basic report, 209 I.C.C. 11. Said prior statutory court, in addition to thus temporarily enjoining the Commission's respective orders of October 14, 1946, remanded to the Commission the respective supplemental proceedings in which such orders had been made, "for such action as it may find justifiable in the premises."

(2) The Commission's respective orders of October 14, 1946, thus temporarily enjoined, required the plaintiff carriers to cease and desist from certain alleged violations of Section 6 (7) of the Interstate Commerce Act in connection with the performance of terminal switching services in the transportation of carload freight to and from the smelters of the American Smelting & Refining Company at Garfield and Murray, Utah, and Lead-

ville, Colorado, and the United States Smelting Refining and Mining Company at Midvale, Utah.

(3) Such alleged violations of Section 6 (7), were based on findings set forth in the Commission's respective reports of the same dates as its respective orders, 266 I.C.C. 349 and 266 I.C.C. 476, and are herein incorporated by reference. Such findings were primarily confined to the terminal switching services at the respective smelters on inbound carload shipments of non-ferrous ores and concentrates handled under line-haul rates, based on the actual value of each carload and on destination weights. The Commission's respective orders extended, however, to carload shipments of all commodities, whether handled inbound or outbound at such smelters.

(4) Such findings were in substance, (a) that under the carriers' duly published tariffs, it is the duty and obligation of the respective smelters to obtain and certify to the carriers the values of ores for the purpose of ascertaining freight charges, and that the carriers are not under any obligation or duty to perform any switching or other services for the purpose of ascertaining, or assisting the smelters in ascertaining, such values; (b) that the "plant yard" at Garfield, the "hold tracks" at Murray, the "flat yard" at Leadville, and the "assembly yard" at Midvale, constitute reasonably convenient points for delivery to and receipt from the respective smelters, of carload freight by the plaintiff carriers; (c) that the transportation services, which it is the duty of the plaintiff carriers to perform under their line-haul rates, begin and end at such designated points; (d) that the line-haul rates of the plaintiff carriers do not include compensation for any terminal switching services beyond such designated points; (e) that the performance by the plaintiff carriers of terminal switching services beyond such designated points, without charge in addition to the line-haul

rates, constitute violations of Section 6 (7) of the Act.

(5) Such prior statutory court, in thus temporarily enjoining the Commission's respective orders of October 14, 1946, made the following findings of fact with respect to each such order:

"(1) The Commission based its order upon the defined premise that the line-haul rates in operation do not cover transportation services rendered by the Companies within the respective plants.

(2) We find that upon such basis the order is contrary to law in that there is no evidence before the Commission which justified the finding that such rates were not compensatory to the transportation companies for the service so rendered.

(3) That the sole evidence in the record which would justify a finding upon that point is to the contrary.

(4) That in view of the decision of the Commission in Ex Parte No. 104 which has been ratified by the Supreme Court, there seems to be inaugurated a new policy in which the Commission may assume power to declare when and where transportation ends and plant service begins and require transportation companies to file separate tariffs for line-haul rates as distinguished from services rendered by the transportation companies within the respective plants.

(5) We find that the Commission has not presumed to exercise the authority which is intended to be conferred under Ex Parte 104 in that the order made is not specifically based upon that authority."

In addition, such court made the following conclusions of law:

"(1) We conclude as a matter of law that in the state of the present record there is no

legal basis for the order issued by the Commission, and that the cases should be returned to the Commission for further proceedings upon the basis of evidence to be taken, or, otherwise, upon a new theory of its inherent powers to require the transportation companies to fix separate and distinct tariffs covering so-called line-haul rates and plant service, such remand being justified by the recent holding of the Supreme Court laid down in Securities & Exchange Commission v. Chenery Corporation, — U. S. —, June 23, 1947, and that an order will accordingly be made remanding said cases to the Commission in accordance with the views herein expressed, and in the meantime that a temporary enjoining order be issued restraining the Commission from placing its so-called order in force and effect until further order of this court."

Judge Phillips, in concurring in the findings and conclusions, stated:

"I join in the foregoing findings and in the disposition to be made of the cases, and desire to further indicate my views.

"The Commission found and determined that the 'plant yard' at Garfield, the 'hold tracks' at Murray, the 'assembly yard' at Midvale, and the 'flat yard' at Leadville constituted reasonable points for the delivery of cars of ore and receipt of empty cars at the smelters; and that line-haul outbound transportation begins and line-haul inbound transportation terminates at those points.

"I would find:

"(1) That such 'plant yard,' 'hold tracks,' 'assembly yard' and 'flat yard' have the physical characteristics of terminal facilities and are actually used by the railroad as terminal facilities.

"(2) That the line-haul transportation properly includes one uninterrupted switch placement, or customary and reasonable terminal services not 'in excess of that performed in simple switching or team-track delivery.'

"The challenged order is predicated on the finding that railroad companies 'line-haul rates do not include compensation' for switching services beyond the points where the Commission found line-haul transportation begins and terminates, and that such switching services were performed without compensation in addition to the line-haul rates, and were therefore unlawful.

"The order requires the railroads to establish reasonable and compensatory charges for all switching services rendered beyond the points where it held the line-haul transportation begins and terminates.

"I would further find:

"(1) That the only evidence in the record tends to support the factual conclusion that the tariffs include compensation for switching services beyond the points where the Commission found the line-haul transportation begins and terminates, especially uninterrupted movements beyond such points.

"(2) That there is no evidence in the record to support a contrary factual conclusion.

"(3) That there is no evidence in the record to overcome the presumption that the railroads are not performing services gratuitously and that the tariffs do include compensation for movements beyond the points where the Commission found line-haul transportation begins and terminates.

"(See Interstate Commerce Commission *vs.* Chicago, Burlington & Quincy Ry. Co., 186 U. S. 320.)

"The order of the Commission does not require a segregation of charges for transportation to and from the points where the Commission found line-haul transportation begins and terminates and charges made for switching services beyond such points. On the contrary, it finds that the tariffs only cover compensation for so-called line-haul transportation and leaves such tariffs undisturbed, and requires the railroads to file additional tariffs exacting separate and additional reasonable and compensatory charges for switching services. This would result in two charges for the same services.

"The question whether the Commission might require the railroad companies to file and publish new tariffs that provide separate and distinct charges for transportation services to and from the points where it found line-haul transportation begins and terminates, and additional and separate charges for switching services beyond those points, is not presented, and it is my view that we should not express any opinion with respect thereto.

"While for the reasons indicated I would hold the order illegal and permanently enjoin its enforcement, I will join in the order of remand."

(6) Neither the Commission nor the United States took any appeal from such order of the prior statutory court temporarily enjoining the Commission's respective orders of October 14, 1946, but the Commission, by its respective orders of December 5, 1947, vacated and set aside its respective orders of October 14, 1946, and reopened the respective proceedings before it for reconsideration of its respective reports and orders therein of October 14, 1946, "upon the present and existing record".

(7) Upon such reopening, the Commission held no further hearing, received no further evidence, and permitted no further briefs or argument, but on May 18, 1948 issued its respective orders, here sought to be enjoined, together with its respective reports, 270 I.C.C. 359 and 270 I.C.C. 385, containing new findings upon which such respective orders are expressly based, which findings are incorporated herein by reference. Such findings likewise relate primarily to the terminal switching services at the respective smelters on inbound carload shipments or non-ferrous ores and concentrates, handled under line-haul rates based on the actual value of each carload and on destination weights. The Commission's respective orders, however, extend to the terminal switching services on carload shipments of all commodities, whether handled inbound or outbound at such smelters.

(8) Such findings are substantially similar to the findings upon which the Commission had based its respective orders of October 14, 1946, except that such findings expressly eliminate any findings as to whether the line-haul rates are reasonable and do or do not include compensation for terminal switching services beyond the designated points. In this connection, the Commission's respective reports containing such findings, expressly state as to each of its said orders of May 18, 1948:

> "It is our purpose to make it entirely clear here that our order herein is based solely upon our findings herein, which in turn are based solely upon the principles and authority established with the approval of the Supreme Court in our original and supplemental reports in Ex Parte No. 104, Part II, and that said order is not based in whole or in part upon any conclusions or findings in connection with tariff provisions or testimony as to whether the published rates are reasonable and do or do not

include compensation for switching within the plant areas."

In addition, the Commission's report involving the smelters of the American Smelting & Refining Company, expressly states:

> "We hereby repudiate any reference or conclusion to the contrary conveyed by our discussion or evidence relative to such questions and the conclusions based thereon in our prior supplemental report herein."

(9) The Commission, in its respective reports of May 18, 1948, expressly disavowed any findings as to whether the switching charges in addition to the line-haul rates, now published in the tariffs of the plaintiff carriers for so-called interrupted switching movements beyond the "plant yard" at Garfield, the "hold tracks" at Murray, the "flat yard" at Leadville, and the "assembly yard" at Midvale, are or are not reasonable and compensatory.

(10) On hearing of these proceedings the parties hereto, with the approval of this Court, stipulated that the entire records in the respective proceedings before the prior statutory Court in Civil Actions Nos. 1324 and 1325, should be considered incorporated by reference in the record of these proceedings as fully as if physically incorporated herein. The records in the prior proceedings, so incorporated herein, comprise among other things the entire evidence, including the exhibits, before the Commission in the respective proceedings before it, which is the same evidence as that upon which the Commission made its respective prior findings and orders of October 14, 1946, and which evidence was held by the prior statutory Court to be insufficient to sustain such findings and orders.

(11) This Court reaffirms and remakes the findings of fact (1) to (5), inclusive, made by the prior statutory Court in temporarily enjoining the Commission's respective orders of October 14, 1946, in so far as such findings of fact relate to the evidence

before the Commission in the making of its respective orders of October 14, 1946, and in the making of its respective orders of May 18, 1948, here sought to be enjoined, and further in so far as such findings of fact of the prior statutory Court refer to the basis upon which the Commission made its respective orders of October 14, 1946.

This Court makes the following additional findings of fact with relation to the Commission's respective orders of May 18, 1948, here sought to be enjoined.

(12) There was no evidence before the Commission to support any of the findings upon which the Commission has based its respective orders of May 18, 1948, and the only evidence of record before the Commission was contrary to such findings and each of them.

(13) There was no evidence to support the Commission's findings that the "plant yard" at Garfield, the "hold tracks" at Murray, the "flat yard" at Leadville, and the "assembly yard" at Midvale, constitute reasonably convenient points for delivery to and receipt from the respective smelters of carload freight by the plaintiff carriers. On the contrary, the only evidence before the Commission was that such carriers, under the express provisions of their duly published tariffs, have for approximately fifty years delivered and received carload freight at actual points of unloading and loading at the respective smelters beyond such designated points, and have never delivered or received such freight at such designated points.

(14) That there was no evidence before the Commission to support its findings that the tracks at such designated points constitute industrial tracks of the respective plaintiff industries. On the contrary, the only evidence before the Commission was that the tracks at such designated points constitute the only available railroad terminal facilities of the plaintiff carriers for their ordinary railroad termi-

nal handling of carload freight to and from the respective smelters of the plaintiff industries, and, as such, are used in the same manner as any railroad terminal facilities are used by carriers generally, in bringing cars into their terminals for further disposition to consignees of inbound shipments, and for the assembling of outbound shipments into the carriers' road-haul trains.

(15) There was no evidence before the Commission to sustain the Commission's findings that the common carrier transportation services which the plaintiff carriers are obligated to perform under the line-haul rates, begin and end at such designated points. On the contrary, the only evidence before the Commission was that the line-haul rates of the plaintiff carriers include compensation for all terminal switching services beyond such designated points, including any so-called "interrupted movements" incident to determining the value of inbound shipments of non-ferrous ores and concentrates.

(16) The uncontradicted evidence before the Commission was that for approximately thirty years prior to July, 1938, the tariffs of the plaintiff carriers expressly provided that the specific terminal switching movements necessary to determine the value of inbound carloads of non-ferrous ores and concentrates were included in the line-haul rates, and that the presently effective tariffs at Leadville continue so to provide. Such evidence was further that while since July, 1938, such tariffs at Garfield, Murray and Midvale still provide that the line-haul rates include terminal switching of carload shipments to track scales and delivery to or receipt from any designated track within the plant which can be accomplished by one uninterrupted movement, such tariffs have, since July, 1938, provided certain charges in addition to the line-haul for terminal switching involving so-called "interrupted movements" resulting from orders from or requirements of the smelters.

(17) The Commission's respective orders of May 18, 1948, herein sought to be enjoined, nevertheless require the carriers to charge for all terminal switching services beyond such designated points, including switching movements incidental to the delivery and receipt of carload shipments at actual and customary points of loading and unloading at such smelters, even though no so-called "interrupted movements" be thereby involved and although neither under the Commission's basic report in Ex Parte 104, Part II nor in any other supplemental proceeding thereunder have charges in addition to the line-haul rates for terminal switching services been required except where so-called "interrupted movements" were thereby involved.

(18) The Commission, in its basic report in Ex Parte 104, Part II, 209 I.C.C. 11, p. 29, made the following general conclusions of law as to the extent of a carrier's legal obligation under its line-haul rates in operating over private industrial tracks in the delivery and receipt of carload freight:

> "If a carrier operates over private industrial tracks, it is because in its discretion it elects to do so, and its legal obligation in such operations extends no farther than is covered by the compensation it exacts for the services performed. In other words, the obligation upon the carrier in such circumstances is to be measured by the compensation received and not be any definite duty otherwise placed upon the carrier by the statutes. The payment by the carrier to a shipper for rendering services upon private tracks which are not contemplated by the charges of the carrier would be 'a gift—a rebate—a thing *ipso facto* illegal and prohibited by the statute.' *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co., supra.* Further, the rendition by the carrier of such services as are not contemplated by the compensation which it receives free and without additional charge is prohibited by section 6

of the Act. *American Exp. Co. v. United States, supra; Louisville & N. R. Co. v. United States, supra.*"

In such basic report, the Commission then stated, p. 44 as follows, with reference to the character of the line-haul rates involved in its general investigation covered by such basic report, and the measure of compensation contained in such rates:

> "It is likewise urged that the line-haul rates have been fixed to compensate the carriers for the performance of spotting service, but our consideration of the service as here involved leads us to a different conclusion. Many of the industries which now receive allowances, or the performance by carriers of the spotting service in lieu thereof, performed their own service without compensation or assistance for many years prior to the time they began receiving aid from the carriers, and at the time the change was made, the line-haul rates were not altered. In such case the carriers simply assumed a burden not previously borne."

The Commission then stated, pp. 44-45 of such report, the following general administrative principles for determining the extent of the obligation of a carrier, in reaching points of loading or unloading within a plant under line-haul rates, of the character involved in the general investigation upon which such report was based. The Commission there stated:

> "When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, as set forth more specifically in rules 8, 9 and 10 of the appendix,

the service beyond the point of interruption or interference is in excess of that performed in simple switching or team-track delivery. Payment for, or assumption by the carrier of, the cost of service performed beyond such points of interruption or interference is found to be unlawful in violation of section 6 of the Act.

"Generally the payment of allowances for service, or the performance of such service without charge, to points within a plant which respondents are prevented, by the desires of an industry or the disabilities of its plant, from reaching, without interruption or interference by the conditions mentioned in the preceding paragraph, provides the means by which the industry enjoys a preferential service not accorded to shippers generally. Such payment or performance dissipates respondents' funds and revenues, is not in conformity with efficient or economical management as contemplated by the Interstate Commerce Act, and not in the public interest."

The Supreme Court of the United States, in *United States* v. *Wabash Railroad Co.* (*Staley Case*), 321 U. S. 403, in upholding such general administrative principles announced by the Commission, expressly recognized that the line-haul rates involved in the Commission's general investigation did not include compensation to the carriers for the performance of "spotting service", *i.e.*, delivery to or receipt from actual points of loading or unloading within a plant. The Court there said, p. 406:

"*After a study of the conditions at some two hundred industrial plants* to which the rail carriers made allowances for spotting service performed by the industries, and at numerous other plants where the spotting service was rendered without charges by the carriers, *the Commission found that the freight rates had*

not been so fixed as to compensate the carriers for such service and that the railroads by assuming to perform it, or pay for its performance by the industries, had assumed a burden not included in the transportation service compensated by the filed tariffs." (Italics supplied)

(19) The Commission's respective orders of May 18, 1948, here sought to be enjoined are not based on the Commission's powers under Section 6 (1) of the Act to require the plaintiff carriers to state separately in their published tariffs their line-haul charges and their terminal charges, and the Commission in making its respective orders has made no order or findings under Section 6 (1) of the Act, although the prior statutory court by its order of remand expressly afforded the Commission an opportunity so to do.

Conclusions of Law

(1) It is *res adjudicata* in these proceedings that the line-haul rates of the plaintiff carriers include compensation for all terminal switching services here involved at the respective smelters of the plaintiff industries.

(2) Under the conclusions of law made by the Commission in its basic report in Ex Parte 104, Part II, set out in Finding of Fact (18), which conclusions of law this Court adopts, it is therefore the obligation of the plaintiff carriers to perform the terminal switching services here involved without charges in addition to their line-haul rates, and in so performing such terminal switching services the plaintiff carriers do not violate Section 6 (7) of the Act.

(3) Since the only evidence before the Commission was that the line-haul rates of the plaintiff carriers include compensation for the terminal switching services here involved, the Commission's respective orders of May 18, 1948, in requiring the plaintiff carriers to collect and the plaintiff in-

dustry to pay charges in addition to the line-haul rates for such terminal switching services, would require the carriers to collect and the industries to pay twice for the same services, and thereby would violate Section 1 (5) (a) of the Act, which requires that all charges for any service in the transportation of property, or in connection therewith, shall be just and reasonable, and which prohibits and declares unlawful any unjust and unreasonable charge for such service.

(4) The Commission by expressly disclaiming in its respective reports of May 18, 1948, any findings as to whether the line-haul rates of the plaintiff carriers do or do not include compensation for the terminal switching services here involved, and by expressly repudiating in its report in the American Smelting & Refining Company case its previous finding that the line-haul rates do not include such compensation, thereby deprived its respective findings of violations of Section 6 (7) of the Act and its respective orders to cease and desist from such alleged violations, of basic findings of fact essential to support such findings of violations of Section 6 (7) and its orders to cease and desist from such alleged violations.

(5) The Commission by thus expressly disclaiming any findings as to whether the line-haul rates of the plaintiff carriers do or do not include compensation for the terminal switching services here involved, and by expressly repudiating its former finding in the case of the American Smelting & Refining Company that such line-haul rates do not include such compensation, thereby rendered irrelevant under Section 6 (7) all other findings upon which the Commission based its respective orders of May 18, 1948.

(6) The Commission's respective orders of May 18, 1948, in requiring the plaintiff carriers to collect charges in addition to their line-haul rates for all terminal switching services beyond the points designated in the Commission's respective find-

ings, even though such terminal switching services beyond such designated points involve no so-called "interrupted movements", violate the general administrative principles determined by the Commission's own basic report in Ex Parte 104, Part II, quoted in Finding of Fact (18) of this Court, which administrative determination by the Commission was approved by the Supreme Court of the United States as within the Commission's administrative powers under Section 6 (7) of the Act, in, among other cases, *United States* v. *American Sheet & Tin Plate Company*, 301 U. S. 402; and *United States* v. *Wabash R. Co.*, (*Staley* case), *supra*.

Moreover such orders in requiring payment of charges in addition to the line-haul rates for all terminal switching services beyond the points designated in the Commission's findings even though no so-called "interrupted movements" be thereby involved, would thereby require the plaintiff industries to pay terminal switching charges from which all other industries have been expressly exempted by the Commission's orders in all other supplemental proceedings under Ex Parte 104, Part II, and would deprive the plaintiff industries of the right thereby available to all other such industries to avoid such additional terminal switching charges by eliminating such interrupted movements. Such orders therefore would result in undue prejudice against the plaintiff industries in violation of Section 3 (1) of the Act.

(7) Assuming that under the tariffs of the plaintiff carriers it is the duty of the plaintiff industries to certify to such carriers the values of inbound carloads of non-ferrous ores and concentrates, and that ordinarily carriers would be under no obligation to perform the terminal switching services necessary to enable industries to determine such values, it is nevertheless the obligation of the plaintiff carrier to perform such terminal switching services without charge in addition to their line-haul rates, since, on this record, it must be conclusively

presumed that compensation for such switching services included in such line-haul rates, and since under the Commission's own conclusions of law in Ex Parte 104, Part II, the measure of such compensation determines the extent of a carrier's lawful obligation under its line-haul rates.

(8) Since it must be conclusively presumed on this record that the line-haul rates of the plaintiff carriers include compensation for the terminal switching services here involved, the performance by such carriers of such terminal switching services without charges in addition to the line-haul rates cannot, as the Commission has found, result in the plaintiff industries' receiving a "preferential service not accorded shippers generally" or in any "refunding or remitting of a portion of the rates and charges collected" merely because the rates and charges for the line-haul services and for the terminal switching services are collected under blanket rates and charges which include compensation for both services, instead of by separate rates and charges for each service which contain compensation only for that service.

(9) The Commission's respective orders of May 18, 1948, cannot be construed as requiring the plaintiff carriers merely to state separately their line-haul charges and their terminal switching charges, since such orders are expressly based solely on Section 6 (7) of the Act, which section confers no such power upon the Commission, and since the Commission has made no findings under Section 6 (1) of the Act, under which section alone the Commission has power to require such separation of line-haul and terminal switching charges.

(10) While the Commission under Section 6 (1) of the Act would have power to require the plaintiff carriers to state separately in their tariffs their line-haul charges and their terminal switching charges, the Commission could only so require upon findings made under Section 6 (1) of the Act, and

on evidence to support such findings. This Court expresses no opinion as to whether the evidence of record before the Commission in these proceedings would support such findings and orders under Section 6 (1) of the Act, no such issue being presented in these proceedings.

(11) The Commission's respective orders of May 18, 1948, in requiring the plaintiff carriers to collect charges in addition to the line-haul rates for all switching movements beyond the points designated in its findings, even though no so-called "interrupted movements" be thereby involved, would require the plaintiff carriers to disregard and depart from the express provisions of their duly published and effective tariffs, and are therefore unauthorized and beyond the powers of the Commission under Section 6 (7) of the Act, at least in the absence, as here, of any findings by the Commission that such tariff provisions themselves violate any section of the Act or are otherwise unlawful.

(12) The Commission's respective orders of May 18, 1948, here sought to be enjoined, are without foundation in law, are based on errors of law, are without findings or evidence essential to support them, are arbitrary and in violation of the Interstate Commerce Act and beyond the statutory powers of the Commission, and should be permanently and forever enjoined, set aside and annulled.

(s.) ORIE L. PHILLIPS,
United States Circuit Court Judge.
(s.) TILLMAN D. JOHNSON,
United States District Judge,
(s.) T. BLAKE KENNEDY,
United States District Judge.

Dated this 7th day of January, 1949.

Filed in United States District Court, District of Utah, Jan. 10, 1949. V. P. Ahlstrom, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Civil No. 1525

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, and AMERICAN SMELTING & REFINING COMPANY, PLAINTIFFS,

vs.

THE UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Civil No. 1524

UNITED STATES SMELTING REFINING AND MINING COMPANY, a corporation, THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, and UNION PACIFIC RAILROAD COMPANY, a corporation, PLAINTIFFS,

vs.

THE UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, DEFENDANTS

FINAL ORDER AND DECREE

The above-entitled causes having come on to be heard on October 18, 1948, before a District Court of three judges duly constituted in accordance with statute, and by agreement of all parties having been submitted for final hearing, and evidence having been taken, briefs received, and arguments heard on behalf of all parties, and the Court being fully advised in the premises, and having entered its findings of fact and conclusions of law made herein in writing,

IT IS HEREBY ORDERED, ADJUDGED and finally determined and decreed, that the respective orders of the Interstate Commerce Commission dated May 18, 1948, be, and the same are hereby permanently enjoined, set aside and annulled, and that the en-

forcement of said orders, and the execution, enforcement and operation thereof, be permanently and forever stayed and enjoined.

Dated this 7th day of January, 1949.

(s.) ORIE L. PHILLIPS,
United States Circuit Judge,
(s.) TILLMAN D. JOHNSON,
United States District Judge,
(s.) T. BLAKE KENNEDY,
United States District Judge.

Filed in United States District Court, District of Utah, Jan. 10, 1949. V. P. Ahlstrom, Clerk.

Clerk's Note: Notation of entry of Judgment made on docket sheet on January 10, 1949, in accordance with Rule 79 of Rules of Civil Procedure.

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